(2)

NO. 84-661

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

HOWARD VIRGIL LEE DOUGLAS

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,

Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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REASONS FOR NOT GRANTING THE WRIT ON CROSS-PETITION

In Waller v. Georgia, ___U.S.___, 104 S.Ct. 2210 (1984), it was held that the Sixth Amendment right to a public trial, while significant and weighty, may, in certain cases, yield to governmental interests provided that certain strict requirements are met. Any closure of any part of a criminal trial must meet the tests set forth in Press-Enterprise Company v. Superior Court, ___U.S.___, 104 S.Ct. 819 (1984). The components of the Press-Enterprise formula include the requirements that the party seeking to close the proceeding must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the

proceeding and it must make findings adequate to support the closure.

In Waller, the reason advanced by the prosecution for closing an entire suppression hearing was that the publication of any information obtained under the wiretap that was not necessarily essential would render the information inadmissible under Georgia law. Some of the evidence would involve persons who were either indicted but not then on trial, or who were not indicted at all. Thus, any evidence against those people might be tainted. The suppression hearing which was closed lasted seven days and only two-and-one-half hours of the entire hearing were devoted to the playing of the tapes in question. Apparently contrary to the representations of the prosecution, only a few of the tapes either mentioned or involved parties that were not then before the court.

This Court considered the closure to be plainly unjustified because the reasons advanced were not specific enough as to whose particular privacy interests might be infringed, what portions of the tapes might infringe them, and what portions of the evidence consisted of the tapes. As a consequence, the findings for closure were both broad and general and did not even purport to justify the closure of an entire seven-day hearing. No alternatives were considered and indeed, the only relevant finding of the trial court was one based apparently on the interest of those future defendants not then on trial. Most importantly, the closure was ordered with little or no consideration for the defendant's Sixth Amendment right.

Here, in its opinion on remand, the court of appeals reiterated its awareness of the principles behind all relevant

decisions of this Court on the subject, and determined that Waller left the original judgment unaffected, basing its judgment on a significant dissimilarity of facts. That judgment is both supportable and proper.

In this case, the interests advanced for closure were the protection of the witness from embarrassment and the protection of the public morality. Douglas v. Wainwright, 714 F.2d 1532, 1545 (11th Cir. 1983). (The court of appeals focused on the protection of the witness of embarrassment as not only the primary but also the proper basis for closure). In light of the circumstances and the motivation for the motion of the prosecution, these reasons were both specific and identifiable. It is obvious that the closure was no broader than necessary to protect the particular interest advanced since it took place during the testimony

of but one witness. The entire proceeding was not closed. Also, the matter testified to during the "closed" portion of the proceedings was precisely related to the reasons advanced for closing the proceedings in the first place.

That leaves the remaining two Waller considerations as the only possible areas of concern. With regards to the alternative to limited closure, we suggest that this particular test is either not applicable to the facts in this case or if applicable, not to the same extent as to the facts appearing in Waller. There, emphasis was placed on this component because the proffered reasons for closure were speculative at best, and to a certain degree, unfulfilled. At any rate, they were legally insufficient to justify closure of the entire hearing. We can think of no alternative to the instant limited closure considering the

facts and circumstances of this case. If an alternative was available, it appears to have been utilized, insofar as instead of closing the proceedings to all people, the trial court allowed families of both the victim and the defendant to be present as well as court personnel and the press. We interpret the alternative requirement of Waller as one based in large measure upon reasonableness. The conditions of closure here were surely reasonable.

Unlike the trial court proceedings in Waller, the record here makes sufficient showing as to the findings in support of the closure. There can be no doubt that the trial court granted the motion for limited closure based only on the reasons advanced and with full knowledge and recognition of Douglas' constitution right to a public trial. 714 F.2d at 1537; (TR-215).

Further distinguishing facts are present in this case. In Waller, this Court seemed unimpressed with the potential for tainted evidence expressed initially by the prosecutor, noting that only a few of the tapes mentioned or involved parties not then before the court. In contrast, the prosecutor in this case knew full well what Helen Atkins was going to say, and his expectations proved most accurate. Also, it would appear that the testimony Helen Atkins gave in a "closed" courtroom turned out to be something which Douglas agreed should not be aired in "total public" since at no time during or after her testimony did he renew any objection, or offer the suggestion that the testimony be repeated in an open court. The significance of this becomes larger when one remembers that direct examination and cross-examination of Helen Atkins was interrupted so that two

other witnesses could testify as a matter of convenience. Court was then recessed overnight. Upon reconvening the next day, Helen Atkins was once again on the stand. (TR-331) We emphasize this since there was more than ample opportunity to object to the limited closure, or, as stated previously, at least suggest that the closure was not justified after all, and that the witness should have been required to re-testify in a totally open court. This failure to object or otherwise move for relief was underscored by the court of appeals in the panel opinion. 714 F.2d at 1546. The possible reason for failing to object could have been the belief of Douglas that after hearing the testimony of Helen Atkins, it was indeed something which did not need to be heard by the general public.

Just as it was determined that the particular facts and circumstances

present in Waller did not justify the closing of an entire hearing, it follows that the particular facts and circumstances in this case did justify the partial and limited closure of only part of the entire proceeding. The respective judgments of the court of appeals, the federal district court, the Florida Supreme Court, and the trial court, was that Douglas' right to a Sixth Amendment public trial was not violated in this case. Importantly, no court which has previously reviewed this case has even attempted to suggest that any part of any criminal trial may be closed merely by the request of the prosecution or any other party; and no rule of law has issued which would offer support for such a request in the future. Based on these facts and these facts alone, the decision in Waller does not require a contrary finding. We contend that the

analysis and resolution of the public trial issue in the panel opinion and in the opinion on remand was correct. The court of appeals, as well as all courts below, correctly balanced the right to a Sixth Amendment public trial with the reasons advanced for closing a part of that trial. We therefore request that the cross-petition for writ of certiorari be denied.

Respectfully submitted on this _____ day of November, 1984.

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